

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30<sup>TH</sup> JUDICIAL CIRCUIT  
INGHAM COUNTY

Commissioner of Insurance  
for the State of Michigan,  
Petitioner,

vs.

Michigan Health Maintenance Organization )  
Plans, Inc., a Michigan health maintenance )  
organization doing business as OmniCare )  
Health Plan, )  
Respondent. )

File No. 98-88265-CR

Hon. James R. Giddings

A.G. No. 1998053333A

**CENTERS FOR MEDICARE & MEDICAID SERVICES'**  
**BRIEF IN SUPPORT OF PRIORITY CLASSIFICATION**

The Centers for Medicare & Medicaid Services (CMS) files the following brief in support of its claim for priority status under Section 8142 of the Michigan Insurance Code, MCL 500.8142. In support thereof, CMS states as follows:

1. The background of CMS's claim is set forth in CMS's Proof of Claim that was timely filed on March 31, 2005. As set forth therein, the proof of claim was filed on behalf of the United States Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS). CMS is the component of HHS that administers the Medicare program.

2. Pursuant to federal law, Medicare is a secondary payer to other health plans or insurance plans. 42 U.S.C. 1395y(b)(2)(A). As such, Medicare only makes conditional payments requiring later repayment when it is discovered that there is another primary plan with which the Medicare beneficiary was enrolled. 42 U.S.C. 1395y(b)(2)(B)(i). CMS is authorized

to seek recovery of Medicare's payments plus interest pursuant to 42 U.S.C. 1395y(b)(2)(B)(ii), (iii).

3. In its proof of claim, CMS identified payments made to health care service providers on behalf of the individuals listed in the proof of claim which should have been paid by the OmniCare Health Plan, and which CMS is entitled to recover from OmniCare Health Plan.

4. It is CMS's understanding that the Commissioner of the Office of Financial and Insurance Services in her capacity as Liquidator of the OmniCare Health Plan (hereinafter "Liquidator") will take the position that medical provider claims should have a higher priority for payment than claims of general creditors, pursuant to MCL 500.8142(b). To the extent that CMS has made payments to medical providers on behalf of individuals covered by the OmniCare Health Plan, however, CMS is subrogated to the original right of such provider or individual to obtain payment from the OmniCare Health Plan, and thus stands in the shoes of the provider or covered individual vis a vis the OmniCare Health Plan.

Thus, 42 U.S.C. 1395y(b)(2)(B)(iv) provides:

The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.

Similarly, 42 C.F.R. 411.26(a) provides:

(a) Subrogation. With respect to services for which Medicare paid, CMS is subrogated to any individual, provider, supplier, physician, private insurer, State agency, attorney, or any other entity entitled to payment by a third party payer.

5. Insofar as the Liquidator prevails in establishing a higher priority status for medical providers or individuals covered by the OmniCare Health Plan, such higher priority status should

therefore also be extended to CMS since CMS is subrogated to the rights that may be asserted by such parties.<sup>1</sup> 42 U.S.C. 1395y(b)(2)(B) (iv); 42 C.F.R. 411.26(a), (b); U.S. v. Blue Cross and Blue Shield of Michigan, 726 F. Supp. 1517, 1522 (E.D. Mich. 1989)(HHS's right of subrogation extends beyond common law or contractual subrogation rights but is based on an independent statutory right).

Wherefore, the Centers for Medicare & Medicaid Services prays that an order granting CMS at least equivalent status with the claims of the medical providers be entered in this proceeding.

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<sup>1</sup> Without waving this assertion, CMS also asserts that in any event it is entitled to a higher priority status over that of other creditors by virtue of MCL 500.8142(c), since the claims it is asserting are federal government claims. At a minimum, CMS's claims should therefore be treated no less favorably than Class 3 claims that are subordinate only to administrative expense claims under Class 1 and policy claims under Class 2. MCL 500.8142(c). However, because CMS is subrogated to the rights of medical service providers to whom it made payment, CMS should be entitled to Class 2 status as we have explained above.

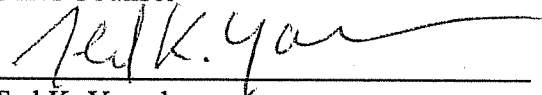
CONCLUSION

For all of the foregoing reasons, CMS respectfully requests that its claim also be given higher priority status, and a status at least equal to any higher priority status that may be granted to the claims of the medical service providers.

Respectfully submitted,  
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By:

  
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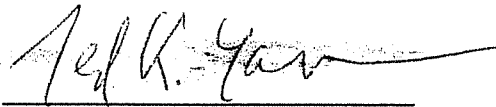
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing CMS's Brief In Support of Priority Classification was caused to be filed and served on the following:

Clerk of the Court  
Circuit Court for the 30<sup>th</sup> Judicial Circuit  
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Health Maintenance Organizations Plans, Inc.  
formerly know as OmniCare Health Plan

by overnight mail on this 16<sup>th</sup> day of June, 2005.

A handwritten signature in dark ink, appearing to read "Ted K. Yasuda", is written over a horizontal line.

Ted Yasuda  
Assistant Regional Counsel